SUPREME COURT, U.S.
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No. 00-1880

In the Supreme Court of the United States

SORIN PICHARDO AND VICTOR ROSARIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, police violated the Fourth Amendment when they ordered petitioners to step out of the open door of their apartment into the hallway for questioning.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 230 F.3d 44.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2000. A petition for rehearing was denied on January 22, 2001. The petition for a writ of certiorari was filed on May 2, 2001, and is therefore untimely. Sup. Ct. R. 13.1 and 13.13. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted by a grand jury in the Southern District of New York on a charge of con-

spiracy to distribute cocaine, in violation of 21 U.S.C. 846. They moved to suppress the evidence seized at the time of their arrest, as well as statements made before and after their arrest. After an evidentiary hearing, the district court granted petitioners' motion to suppress. Pet. App. 8a. The court of appeals reversed. Pet. App. 1a-26a.

1. On October 12, 1998, the police arrested Pedro Mora in possession of a kilogram of cocaine. Mora, who agreed to cooperate, contacted his drug source, Julio Gori. As police officers listened in, Mora told Gori that he wanted to pick up two kilograms of cocaine for two customers. Gori told Mora to come by later that afternoon. Pet. App. 3a.

Accompanied by two police officers, Mora went to an apartment building where Gori previously had delivered to him kilogram quantities of cocaine. From an unmarked car, Detective Armando Rodriguez and Sergeant Diane Contreras watched as Gori and petitioner Pichardo entered the building. Detective Rodriguez followed the men and saw them enter Apartment 1M. Fifteen minutes later, Mora telephoned Gori and advised that he was waiting in front of the building. Gori then exited the building carrying a small bag. The police arrested Gori, searched the bag, and found two yellow packages, each containing a kilogram of cocaine. Gori told police that someone in the building had given him the bag. Pet. App. 4a.

Pending further instructions from their lieutenant, who had not yet arrived, Rodriguez, Contreras, and a third officer set up surveillance in the lobby of the apartment building. Twenty to thirty minutes later, a woman entered the apartment lobby with a food delivery order for Apartment 1M. Detective Rodriguez decided to accompany the delivery woman to Apart-

ment 1M because he was concerned that if he prevented the delivery, the occupants might investigate the delay and be alerted to the officers' presence; however, if he allowed the delivery to be made, the delivery woman might betray their presence. Pet. App. 4a-5a.

Detective Rodriguez and Sergeant Contreras, with their guns drawn and pointed at the floor, positioned themselves on either side of the delivery woman as she stood in front of the door. After the delivery woman knocked on the door to Apartment 1M, the door was opened wide. The officers immediately displayed their shields and ordered everyone to step out into the hallway. From his position in the hallway, Detective Rodriguez could see five people through the open door, including petitioner Rosario. A moment later, petitioner Pichardo emerged from a rear bedroom. All six occupants then stepped into the hallway. Pet. App. 5a.

When petitioner Rosario identified himself as the owner of the apartment, Detective Rodriguez asked if he knew "the fat guy," motioning to Gori, who had been handcuffed and brought into the hallway area. Rosario looked at Gori, nodded and hesitated. One of the officers asked to speak in private, and Rosario moved back into the apartment, followed by the officers. Rosario stated that Gori had given him a thousand dollars to hold a bag for him. Rosario consented both orally and in writing to a search of the apartment. Rosario took the officers into the bedroom and showed them a bag containing five kilograms of cocaine inside an armoire. Pet. App. 5a-6a.

One half hour later, an officer arrived at the apartment with a consent to search form that was written in Spanish. After Rosario read and signed the form, officers searched the apartment and seized the cocaine from the armoire, as well as dilutants, documents, drug

paraphernalia, and $15,000 cash. Petitioners were arrested and taken to Drug Enforcement Administration offices. There, after being advised of and waiving his *Miranda* rights, Pichardo stated that he knew that Gori and Rosario were drug dealers, but claimed that he did not know that there had been drugs in the apartment at that time. Pet. App. 7a.

2. Following their indictment on a charge of conspiracy to distribute cocaine, the district court granted petitioners' motion to suppress the evidence seized from the apartment as well as petitioners' statements. Pet. App. 8a. The court found that the officers had reasonable suspicion to believe that evidence of criminal activity might exist in Apartment 1M, and that Rosario had voluntarily consented to the officers' entry into, and the search of, the apartment. *Ibid.* The court nonetheless found that the order to the occupants to exit the apartment constituted a warrantless seizure in violation of the Fourth Amendment. *Ibid.* The court reasoned that the order to exit constituted an "entry" in violation of the holding of *Payton* v. *New York*, 445 U.S. 573 (1980), that, absent exigent circumstances, police officers must obtain a warrant before entering a home to make a felony arrest. Pet. App. 9a. The court further found that the violation tainted Rosario's statements and his two consents to search the apartment, as well as Pichardo's statement that he knew the others were drug dealers. *Id.* at 10a.

3. The court of appeals reversed. Pet. App. 1a-26a. The court held that the officers' order to evacuate Apartment 1M did not violate the rule in *Payton*, because "the interior of Apartment 1M was exposed to public view when the door was voluntarily opened." *Id.* at 15a. The court therefore found that the case was governed by this Court's decision in *United States* v.

Santana, 427 U.S. 38 (1976), which held that the warrantless arrest of a woman standing in the open doorway to her home did not violate the Fourth Amendment because the open doorway was a public place in which she had no reasonable expectation of privacy. Pet. App. 15a-16a. Because the rule in *Payton* was not implicated, the court concluded that a warrant was not necessary as long as the officers' conduct was reasonable. *Id.* at 11a, 17a, 19a, 21a.

The court further held that the officers "acted reasonably at every stage of the 'swiftly developing situation'" facing them. Pet. App. 21a (quoting *United States* v. *Sharpe*, 470 U.S. 675, 686 (1985)). The court noted that the officers had reasonable suspicion that Apartment 1M was a stash house for narcotics and that its occupants might be involved in narcotics trafficking. *Id.* at 22a. The court also found that the arrival of the food delivery ordered by the apartment's occupants called for immediate measures, and the officers reasonably accompanied the delivery woman to the door when she knocked so that the occupants would not be alerted to the officers' presence. *Ibid.* The court further found that, "when the door was opened, and the occupants and the police could see each other, it was reasonable for the police to ask the occupants of a known narcotics stash house to step outside for the purposes of a limited investigation." *Id.* at 23a. The court concluded that the officers acted "to assure their own safety, the safety of the person delivering the food, and the safety of the occupants." *Id.* at 24a.

Judge Sotomayor dissented. Pet. App. 27a-44a. In her view, the police order to exit constituted a constructive entry into the apartment violating the rule of *Payton*. *Id.* at 31a-38a.

ARGUMENT

Petitioners argue (Pet. 12-17) that the court of appeals erred in upholding the police order directing petitioners to step out from the apartment. That contention is not ripe for review and, in any event, is without merit.

1. As an initial matter, petitioners' contention is not ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress the evidence. If petitioners are acquitted following a trial on the merits, their current contention will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their current contention, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them.

2. In any event, the court below correctly rejected petitioners' claim. In *Payton* v. *New York*, 445 U.S. 573, 576, 589 (1980), the Court held that, absent exigent circumstances, police must obtain a warrant before they enter the home to conduct a search or otherwise intrude on an individual's legitimate expectation of privacy. A warrant is not required, however, in circumstances where individuals have no reasonable expectation of privacy. Thus, no warrant is required either for the arrest of an individual in a public place (*United States* v. *Watson*, 423 U.S. 411, 415 (1976)), or for the seizure of an item in plain view (*Arizona* v. *Hicks*, 480 U.S. 321, 326 (1987)). Similarly, in *United States* v. *Santana*, 427 U.S. 38, 42 (1976), the Court upheld the warrantless arrest of a woman standing in the open doorway to her house because the open doorway was a

public place in which she had no reasonable expectation of privacy. As the Court explained, a person standing in the doorway "was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." *Ibid.* See also *Katz* v. *United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). This Court has also held that police may stop a person in a public place to conduct a brief questioning based upon reasonable suspicion. *Terry* v. *Ohio*, 392 U.S. 1, 8, 20 (1968). As the Court explained in *Terry*, such situations involve "an entire rubric of police conduct—necessarily swift action predicated upon on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved * * * must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Id.* at 20.

Applying those principles, the court of appeals properly held that the warrantless seizure of petitioners in this case did not violate this Court's holding in *Payton*. Here, the occupants of the apartment, responding to the knock of the delivery woman, voluntarily opened the front door, placing themselves "face to face" with the officers who were standing in the hallway. Pet. App. 25a. In other words, when petitioners "voluntarily opened the door to the Apartment 1M in response to a knock from the delivery person whom they invited, they created a vista from a public place or common area" and thus lost any "expectation of privacy as to what could be seen from the hall." *Id.* at 16a, 17a. The officers in this case did not enter the apartment until

petitioner Rosario consented to the entry. *Id.* at 5a, 8a.* In those circumstances, the court of appeals properly found this case to be governed by *Santana* rather than *Payton*. *Id.* at 15a; cf. *Illinois* v. *McArthur*, 121 S. Ct. 946, 952 (2001) (citing *Santana* in rejecting claim that a police order to a suspect standing on porch to stay out of home was a constructive eviction of suspect from home).

Petitioners contend (Pet. 12) that the court of appeals' holding would permit officers to order occupants to exit a residence based on what officers may observe from an open window. The court of appeals, however, did not consider that question. Indeed, the court repeatedly stressed that the occupants in this case voluntarily opened the door in response to an *invitee*, Pet. App. 16a, 17a & n.5, and the court specifically stated that its decision did not address whether "a suspect loses the heightened protection of *Payton* merely by opening a door in response to a knock by law enforcement." *Id.* at 17a n.5; see also *id.* at 13a ("It is unclear whether *Payton's* solicitude is aroused when a dwelling is penetrated by the voice of a police officer standing outside."); accord *id.* at 14a n.3.

Finally, petitioners do not challenge the court of appeals' conclusion that the officers acted reasonably at all times given the circumstances. Pet. App. 21a-26a.

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* Petitioners argue (Pet. 16) that the facts in *Riddick* v. *New York*, No. 78-5421, a companion case to *Payton*, involved a residence whose "interior * * * was voluntarily opened to the public." That is not correct. In *Riddick*, police entered the defendant's home after the defendant's 3-year old son opened the door in response to police knocking. The Court thus concluded that "the police entered before Riddick had an opportunity either to object or to consent." 445 U.S. at 583. In this case, by contrast, the police entry was consensual.

As the court stated, "[t]he encounter at the door of Apartment 1M was precipitated by the arrival of the food delivery ordered by the occupants." *Id.* at 22a. At that point, "[t]he police had no obvious option * * * other than to proceed as they did." *Id.* at 21a. As the court explained:

> If [police] let the delivery woman proceed unaccompanied after seeing police in the foyer, she might betray their presence intentionally or by her alarm; if they turned her away, the hungry occupants might have called the take-out restaurant to complain about the delay, and been alerted that way. The police could assume that once alerted, the occupants might have disposed of the contraband by the window or the toilet, or might have precipitated violence.

Id. at 22a. It was therefore reasonable for the officers to accompany the woman to the door as she knocked and, once "the occupants and the police could see each other," the officers reasonably asked the occupants, who were reasonably suspected of narcotics trafficking on the premises, to step outside in order to protect the safety of the officers, the delivery woman, and the occupants. *Id.* at 23a-24a.

3. This Court's review is also not warranted because petitioner would not be entitled to suppression of the evidence at issue even if we assume, *arguendo*, that the order to step out from the apartment violated the rule in *Payton*. Here, the officers obtained all the excluded evidence as a result of petitioner Rosario's consent to the officers' search of his apartment. In *New York* v. *Harris*, 495 U.S. 14 (1990), this Court held that the exclusionary rule does not bar the admission of a confession given by a defendant after he was arrested

inside the home in violation of *Payton*, because the officers had probable cause for the arrest independent of the entry into the home and the confession "was not the product of being in unlawful custody." *Id.* at 19.

That analysis applies here. The officers had reasonable suspicion to detain petitioners had the officers encountered them outside Apartment 1M. See Pet. App. 18a ("It is undisputed that officers * * * had 'reasonable suspicion' entitling them to carry out an investigation of where Gori obtained the cocaine by questioning the occupants of Apartment 1M.") (quotation marks omitted). Moreover, petitioner Rosario's consent was not the product of an unlawful seizure, but was completely voluntary. *Id.* at 8a. Thus, his consent "was not an exploitation of [any] illegal entry into [his] home." *Harris*, 495 U.S. at 19. For that reason as well, the evidence seized and petitioners' statements should not have been suppressed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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